To consider the first portion of section 1379 only, then, is a non-resident executor "the person so entitled?" Very evidently one named in the will as executor is not entitled, as such, to letters of administration, except in so far as is any person who is legally competent. An executor is entitled to letters testamentary, but section 1379 speaks of administration only, and by this must be taken to mean letters of administration, not letters testamentary. An executor, then, as such, could not be entitled to letters of administration as against the public administrator, to whom the code requires preference to be given over one who is merely a "person legally competent." [8] The fact that the will is a foreign will and the executor a non-resident, can produce no different result. Except as modified by conflicting provisions in sections 1322-1324 of the Code of Civil Procedure dealing with foreign wills, there is no reason to suppose that the general provisions as to matters of probate do not govern in the case of a foreign will equally as in the case of a domestic will.[9] Since the executor is a non-resident, he would not, even in the event that no one opposed him, be entitled to letters of administration (as distinguished from letters testamentary) in view of the provisions of section 1369. The nominee of a non-resident executor, therefore, may not be preferred to the public administrator in granting letters of administration, inasmuch as an executor is not entitled as against the public administrator to letters of administration, and, if a non-resident, is not entitled to letters of administration at all.

W. W. F., Jr.

Libel: Malice.—The question of malice will probably never cease from troubling. The courts centuries ago raised a ghost that will never be laid. Some of the great intellects of the bench, such, for instance, as Justice Bayley,[1] Lord Esher,[2] and Lord Herschell,[3] have endeavored, with penetrating insight and perspicuous phrase, to make the meaning and application of malice simple and unambiguous, but all to no avail as against the proneness of the average human mind to wander into the inviting shades of error. Justice Henshaw did two years ago for California,[4] the service that has been done before for England, in fully, clearly and explicitly expounding the part that malice plays in the law of libel. There no longer seems any excuse for either trial judge or appellate court to go wrong in thir rulings on this subject.

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[8] California Code of Civil Procedure, sec. 1365.

[9] Estate of Meier, (supra); Estate of Coan, (1901) 132 Cal 401, 64 Pac. 691; Estate of Rankin, (1912) 44 Cal. Dec. 553, 127 Pac. 1034.

[1] Bromage v. Prosser, (1825) 4 B. & C. 247.

[2] Clark v. Molyneux, (1877) 3 Q. B. D. 237.

[3] Allen v. Flood, (1898) A. C. 1.

[4] Davis v. Hearst, (1911) 160 Cal. 143, 116 Pac. 530.

How inveterate error is, however, is shown again in the case of Lewis v. Hayes,[5] decided by the Supreme Court on May 29. Justice Henshaw's brief opinion will serve as a pointed reminder of the exhaustive treatment of the subject to be found in the opinion in Davis v. Hearst.

The case under review, that of Lewis v. Hayes, was one of the simplest. A newspaper published a false and unprivileged news item imputing the affliction of leprosy to a woman, who earned her living by keeping a lodging house and giving dancing lessons. The jury found that she had been greatly injured in her business. She was awarded $1792 damages. That she should have full compensatory damages there could be no doubt. There is likewise no doubt that the jury might, if they found an evil or vindictive motive actuating the publication of the article, or a reckless disregard of the truth or falsity of a charge which for centuries has been regarded as defamatory per se, have added punitive damages as an additional solace. The instructions of the trial judge, however, are so affected with error that the cause has to be remanded for a new trial.

Three instances of error in the instructions may be pointed out. Justice Henshaw said in Davis v. Hearst, what every man concerned in the administration of justice ought to have known, "It has been said, and cannot be said with too much emphasis, that a full recovery in compensatory damages may be had under our civil law of libel without the pleading of malice, without the proof of malice, and without the existence of malice." The trial judge in the Lewis case, nevertheless, directed the jury in these words: "One of the necessary elements of libel is malice. If there is no malice, there can be no libel." He then, of course, endeavored to explain, thereby confusing himself and doubtless embarrassing the jury, that there are two kinds of malice, and that he only meant the kind that didn't mean malice. Unfortunately, we must acquit the trial judge, because he was but following the lead of the Supreme Court,[6] notwithstanding our Civil Code (Sec. 45) was clear enough for California, and Odgers had plainly shown that the word malice as laying the foundation for libel was to be discarded even in common law jurisdictions.[7]

The second serious error in the instructions of the lower court was in directing the jury that malice in fact, true malice, is to be presumed if the publication per se, is unprivileged and is false. The correct rule had been laid down by Justice Henshaw in Davis v. Hearst, as follows: "The truth is that malice in fact is never presumed, but is always to be proved, and the utmost limit of the law is reached when it is declared that by proof of the unprivileged character of a publication, libelous per

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[5] 45 Cal. Dec. 666 (May 29, 1913).

[6] Childers v. Mercury Printing Co., (1894) 105 Cal. 284, 38 Pac. 903; Taylor v. Hearst, (1895) 107 Cal. 262, 40 Pac. 392.

[7] Odgers, Libel and Slander, (4th ed.) 320.

se, the jury may infer the existence of this malice." It is to be noted that Justice Henshaw gives, among his authorities, no California precedent for his rule; and the trial judge may have found exact warrant for his instruction in Tingley v. Times-Mirror Company,[8] where the court says: "Where the publication is libelous per se, the law presumes malice in fact in its publication."

The third error which we note in the instruction is where the judge says to the jury, in the event they find malice in fact on the part of the defendant, "I charge you the plaintiff is entitled to recover punitive and exemplary damages." In Davis v. Hearst this very situation had been met by this clear declaration of the law: "The vice of this instruction is that it tells the jury that, upon finding malice, the plaintiff is 'entitled,' as of right to an award of punitive damages. A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. . . . Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award." Again, however, it may be that the trial judge was led astray by the Supreme Court itself. In Tingley v. Times-Mirror Company, the court spoke of the plaintiff being, under certain circumstances, "entitled" to exemplary damages, and in Graybill v. De Young,[9] where the following instruction was under consideration, "If you find that the article in question was published wantonly, recklessly and with utter disregard as to whether it was true or false, then I charge you that plaintiff is entitled to recover exemplary and also compensatory damages," the court said: "This instruction is complained of. Within its limitations it certainly correctly states the law." Now, it is true that the word "entitled" was not adverted to by the court, but in all charity we must admit that the trial judge in the case under review was justified in thinking he stated the law as approved by the Supreme Court.

Although the victim of the libel did not deserve to have to put her case to another trial, we must applaud the attitude of the court in criticising the instructions, and we must do all that each of us can to minimize the likelihood of such perverse and obstinate errors as those that lurk about the word malice playing havoc with the administration of justice. W. C. J.

Municipal Corporations: Waterworks: California Const. Sec. 19, Art. XI.—In a refreshingly brief opinion the Supreme Court of the

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[8] (1907) 151 Cal. 1, 89 Pac. 1007.

[9] (1903) 140 Cal. 323, 73 Pac. 1067.